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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

No. 300

THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY, GUY A. THOMPSON, TRUSTEE, AND PORT ISABEL & RIO GRANDE VALLEY RAILWAY COMPANY,
Petitioners,
v.
BROWNSVILLE NAVIGATION DISTRICT OF CAMERON COUNTY, TEXAS, ET AL., *Respondents*

PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF

J. H. TALLICHET,
Attorney for Port Isabel & Rio Grande Valley Railway Company;
ROBERT H. KELLEY,
Attorney for Guy A. Thompson, Trustee.

GILLESPIE-ALPHA CO.

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BROWNSVILLE NAVIGATION DISTRICT OF CAMERON COUNTY, TEXAS, ET AL., *Respondents*

PETITION FOR CERTIORARI

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

The joint and several petition of Guy A. Thompson, Trustee of the properties and assets of The St. Louis, Brownsville and Mexico Railway Company, Debtor, and Port Isabel & Rio Grande Valley Railway Company, respectfully shows:

1. Respondents, Brownsville Navigation District of Cameron County, Texas, F. A. Lallier and J. T. Philen, Jr., applied to the District Court of the United States for the

Southern District of Texas, for a writ of mandamus against petitioners, commanding them to transport certain traffic, and to furnish adequate and sufficient cars for its transportation, between Matamoros, Mexico, and the Port of Brownsville, Texas (R. 4).

2. In their petition for mandamus, respondents alleged:

> "Said Respondent, Missouri Pacific (the Trustee), operates within Brownsville a depot and terminal facilities for the handling of the local traffic, for switching and other terminal purposes" (R. 9).
>
> "In order to move the traffic from the turning basin at the Port of Brownsville to uptown Brownsville and to a connection with the railways of Mexico serving Matamoros, it is necessary to use the joint service of both Respondents" (R. 10).
>
> " * * * respondent Missouri Pacific lines has refused and declined to furnish equipment to respondent Port Isabel Railway for the purpose of moving the traffic that is now available for transportation from the Port of Brownsville to Matamoros * * * " (R. 13).
>
> " * * * particularly is respondent, Missouri Pacific lines handling traffic under tariffs and charges similar to that herein described at Laredo, Texas, for the interchange and switching of traffic between Laredo in the State of Texas, and Nuevo Laredo * * * Tamaulipas, Mexico" (R. 14).
>
> "Heretofore at all times in the past and at the present time, respondent Missouri Pacific lines has furnished equipment, box cars, flat cars and gondola cars for the interchange of traffic coming from old Mexico into the United States through the various gateways, including Brownsville, Texas" (R. 14).
>
> "Respondent Missouri Pacific lines, has heretofore at all times in the past and is now at the present time, furnishing its equipment for the transportation of all commodities from ports of Corpus Christi and Houston, Texas, to various gateways including Laredo and Brownsville, Texas, for interchange with the national railways

of Mexico, for transportation into old Mexico * * *" (R. 15).

" * * * subsequent to May 16, 1936, and after the opening of the Port of Brownsville, respondent Missouri Pacific lines refused and declined and is now refusing and declining to furnish the necessary equipment for the movement of the traffic through Brownsville * * * " (R.17).

" * * * and respondent Missouri Pacific lines has acted with a deliberate design for the purpose of diverting the tonnage from the Port of Brownsville to other gateways * * * " (R. 20).

" * * * respondents are denying to the Port of Brownsville and the petitioners herein equal opportunity to move their traffic under interstate rates and charges lawfully on file with the Interstate Commerce Commission for the express purpose and design of diverting the traffic from the Port of Brownsville to other ports and other gateways. It is further specifically alleged that respondent Missouri Pacific lines is furnishing the equipment and permitting the traffic to move through other gateways and other ports * * * " (R. 23).

" * * * respondent Missouri Pacific lines will furnish the necessary equipment and facilities for the movement of identical traffic here involved via Corpus Christi and Laredo to Mexico and from Mexico via Laredo to Corpus Christi, and at the same time said respondent is refusing and declining and has refused and declined to furnish equipment and facilities for the transportation of the same identical commodities through Brownsville and Matamoros to and from the same origins and destinations in the nation of old Mexico" (R. 25).

" * * * the acts of respondents herein described are preventing them (appellants) from having interstate traffic moved by common carriers * * * at the same rates and charges and under the same terms and conditions under which respondents are transporting the identical traffic for other shippers and other gateways" (R. 26).

3. Petitioners pleaded to the jurisdiction of the District

Court on the ground that the matters involved are within the primary and exclusive jurisdiction of the Interstate Commerce Commission (R. 37, 47). The District Court, after hearing evidence on these pleas (R. 71-185), sustained them in a memorandum opinion (R. 56) and dismissed the petition for lack of jurisdiction (R. 59).

4. On appeal, the Circuit Court of Appeals for the Fifth Circuit (R. 188*), Circuit Judge Hutcheson dissenting (R. 196), held that the District Court had jurisdiction to grant the petition for mandamus, reversed the judgment of the District Court, and remanded the cause for further proceedings not inconsistent with the majority opinion (R. 202).

5. As shown by petitioners' map (R. 105), respondent District owns certain tracks which serve the turning basin of the Port of Brownsville. These connect with the tracks of petitioner, Port Isabel & Rio Grande Valley Railway Company, hereinafter called the Port Isabel. The tracks of the latter connect, in the City of Brownsville, with tracks of petitioner, Trustee. The Trustee's tracks connect with those of Brownsville & Matamoros Bridge Company, hereinafter called the Bridge Company, and the Bridge Company's tracks connect, on the Mexican side of the river, with those of the Mexican National Lines. The tracks owned by respondent District are switched by the Port Isabel (R. 138). In consequence, any shipment moving between the Port of Brownsville and Matamoros, or any other point in Mexico reached through Matamoros, must move 7.4 miles over rails operated by the Port Isabel, 2.49 miles over the Trustee's rails, and 1.24 miles over the Bridge Company's rails; thence over the rails of the Mexican National Lines (R. 104). This situation is well described in the opinion of the learned trial judge (R. 58).

The tariffs (R. 125-136) applicable to movements over

*Reference to pages of the Record subsequent to 186 are to the pages of the manuscript record prepared in the Circuit Court of Appeals.

these lines, between Matamoros and the Port of Brownsville, are not joint but several, as alleged in the petition for mandamus (R. 10-11). The Port Isabel has a tariff (R. 125) to which the Trustee and the Bridge Company are not parties. The Trustee has a tariff (R. 128) to which the Port Isabel and the Bridge Company are not parties. And the Bridge Company has a tariff (R. 135) to which the Trustee and the Port Isabel are not parties, although the Trustee was a party thereto prior to May 4, 1936. Therefore, to determine the aggregate charges for the movement of a carload of freight between Matamoros and the Port of Brownsville, there must be added together the separately established charges of the Mexican National Lines, the Bridge Company, the Trustee and the Port Isabel (R. 121).

6. In the situation thus described, respondents seek a writ of mandamus, commanding petitioners to move traffic between Matamoros and the Port of Brownsville, and to furnish equipment and facilities therefor (R. 26). There is no allegation that the Trustee has refused to *transport* respondents' traffic. It is merely alleged that he has refused to *furnish equipment* (R. 17). Obviously, no traffic has been tendered to the Trustee for transportation by respondents, either at the Port of Brownsville or at Matamoros, because the Trustee only operates an intermediate line and has no railroad which directly serves Matamoros or the Port of Brownsville. It is alleged by respondents that the Port Isabel has refused to furnish equipment for the transportation of the traffic mentioned, because it does not own a sufficient supply (R. 10). The proof shows its equipment is limited to one caboose and one water car, and it "owns no serviceable freight equipment whatever" (R. 138). The Mexican National Lines will not allow their equipment to leave the Republic of Mexico (R. 111-112). The Bridge Company and the Port Isabel own no equipment. Therefore, the Trustee, who operates only an intermediate switching line, has been called upon to

furnish all of the equipment needed for the interchange of traffic between points which his rails do not serve directly.

7. Thus the case is not concerned with the construction of a tariff or any provision of a tariff. The case of respondents is grounded on a complaint that petitioners have failed and refused to furnish cars as demanded, and that such refusal is unreasonable and discriminatory. The learned trial judge and Circuit Judge Hutcheson thought that such a case should go to the Interstate Commerce Commission. The majority in the Circuit Court of Appeals have ruled otherwise.

8. The Circuit Court of Appeals in its decision herein (R. 188) decided, in a way probably in conflict with the applicable decisions of this Court, the Federal question whether the complaint of respondents is one over which the Interstate Commerce Commission has primary and exclusive jurisdiction, precluding a resort to the District Court for a writ of mandamus.

9. Petitioners file herewith a certified transcript of the record as required by Rule 38(1); and attach hereto a brief in support of this petition.

WHEREFORE, petitioners jointly and severally pray that in the exercise of its discretion, this Court may issue its writ of certiorari to review the decision herein of the Circuit Court of Appeals, and for such other orders as may be appropriate.

Respectfully submitted,

J. H. TALLICHET,
Attorney for Port Isabel & Rio Grande Valley Railway Company;

ROBERT H. KELLEY,
Attorney for Guy A. Thompson, Trustee.

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Petitioners,
v.
BROWNSVILLE NAVIGATION DISTRICT OF CAMERON COUNTY, TEXAS, ET AL., *Respondents*

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Grounds of Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the JUDICIAL CODE, as amended by the Act of February 13, 1925 (43 Stat. 936), authorizing this Court to issue writs of certiorari to review judgments of the Circuit Courts of Appeals. There was such a judgment here (R. 202), rendered July 15, 1937. In similar circumstances, a petition

for certiorari was granted in DI GIOVANNI v. CAMDEN FIRE INSURANCE COMPANY, 295 U. S. 728.

Statement of the Case

As stated in the Petition for Certiorari, respondents seek a writ of mandamus to compel petitioners to furnish cars for transportation of traffic in both directions between Matamoros, in the Republic of Mexico, and the Port of Brownsville, in the State of Texas.

On movements from the Port of Brownsville, the initial carrier must be the Port Isabel and none other, for it is the only railroad serving the Port. It has no equipment except "one caboose and one water car, but it now owns no serviceable freight equipment whatever." It now has pending before the Interstate Commerce Commission and the Reconstruction Finance Corporation, applications for a loan to enable it to buy some freight equipment, but the respondents "have objected and are yet objecting to all of the proposed loan * * * " (R. 138-139).

In the opposite direction, on traffic to the Port of Brownsville originating at Matamoros, the initial carrier must be the Mexican National Lines, which refuses to permit its equipment to come into this country (R. 112).

The tariffs of petitioners under which this traffic must move, if at all, are *switching* tariffs only (R. 125, 128), and contain no rules, regulations or promises respecting the furnishing of cars. Thus, as said in Judge Hutcheson's dissent, "what is sought is a court decree to compel a connecting carrier having no interest in or concern with a movement, except to perform a switching service, to furnish all cars which may be needed for shipments to Mexico, as to which there is no joint through rate, which do not originate on its lines, and in regard to which it gets no line haul" (R. 200-201); and he might have added that the respondents also seek (R. 26) to have this connecting carrier furnish all the cars required for

movements in the reverse direction, originating at Matamoros.

The proof details the many complex factors entering into the task of supplying various types of cars needed for transportation; the problems constantly arising for solution and the necessity of making frequent changes in plans on short notice (R. 106-116). The problem, therefore, is essentially administrative. No rule or other provision of any tariff was offered in evidence for construction by the Court as to meaning or application. The real complaint is that the refusal to furnish cars as demanded is unreasonable and unjustly discriminatory.

The majority opinion erroneously stated that Lallier and Philen "tendered freight to the appellees who failed to transport it" (R. 191). As stated above; it is physically impossible to tender freight to the Trustee either at Matamoros or the Port of Brownsville, or to the Port Isabel at Matamoros. The majority also fell into error in saying "there is no request or necessity for an order requiring the Missouri Pacific to send its equipment to foreign soil" (R. 195). Obviously, cars cannot be sent to Matamoros for loading or unloading, without entering Mexico. The very essence of the complaint rests on the refusal to furnish cars for movements to and from points in the Republic of Mexico.

The majority in the Circuit Court of Appeals said that respondents "have requested transportation facilities to be furnished *under the regular tariffs* on file" (R. 194). Under what tariff? This record shows no tariff rule or statement that cars will be furnished for these movements.

Reference is also made to the statements contained in the foregoing petition.

Specification of Errors

1. The Circuit Court of Appeals erred in reversing the judgment of the District Court.

2. The Circuit Court of Appeals erred in holding and deciding that the District Court has jurisdiction to try the cause.

3. The Circuit Court of Appeals erred in holding and deciding that the Interstate Commerce Commission does not have exclusive jurisdiction over the matters complained of by respondents.

4. The Circuit Court of Appeals erred in finding that respondents Lallier and Philen tendered freight to petitioner Trustee, and that he failed to transport it.

5. The Circuit Court of Appeals erred in finding that there is no car shortage and no emergency which renders petitioners unable to comply with the order sought by respondents.

Argument

The District Court, we submit, was clearly right in holding that the complaint should go first to the Interstate Commerce Commission. This is true for two reasons:

First, as stated by MR. JUSTICE BRANDEIS in GREAT NORTHERN RY. CO. v. MERCHANTS' ELEVATOR COMPANY, 259 U. S. 285, the function to be exercised "is in its nature administrative, in contradistinction to judicial * * * . The inquiry is essentially one of fact and of discretion in technical matters * * * reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable, and such acquaintance is commonly to be found only in a body of experts."

Secondly, the refusal to furnish cars, which may be deemed a rule or practice, is attacked as unreasonable and unjustly discriminatory. The solution of such a question is plainly for the Commission, under TEXAS & PACIFIC RY. CO. v. ABILENE COTTON OIL COMPANY, 204 U. S. 426, for if, without pre-

vious action by the Commission, courts and juries should undertake to determine the reasonableness of petitioners' action, "it would follow that, unless all courts reached an identical conclusion, a uniform standard * * * would be impossible."

In GREAT NORTHERN RY. CO. v. MERCHANTS' ELEVATOR COMPANY, *supra*, this Court said:

> "This action was brought by the Merchants' Elevator Company in a state court of Minnesota against the Great Northern Railway Company and the Director General to recover $80 alleged to have been exacted in violation of the carrier's tariff. That sum had been demanded by the carrier, under Rule 10 of its tariff, as a reconsignment charge at the rate of $5 a car, for 16 cars of corn shipped from points in Iowa and Nebraska to Willmar, Minn., and after inspection there rebilled to Anoka, a station beyond. * * *
>
> "Whether the charge was payable depended solely upon a question of construction; that is, whether the body of the rule or the exception to it applied. On this question there was room for reasonable difference of opinion. The carrier, relying particularly upon Texas & Pacific Ry. Co. v. American Tie & Lumber Co., 234 U. S. 138, 34 Sup. Ct. 885, 58 L. Ed. 1255, and Loomis v. Lehigh Valley R. R. Co., 240 U. S. 43, 36 Sup. Ct. 228, 60 L. Ed. 517, claimed seasonably that until the true construction of the tariff had been determined by the Interstate Commerce Commission, the trial court was without jurisdiction. That court overruled the objection, * * *
>
> "Whenever a rate, rule, or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. Sometimes this is required because the function being exercised is in its nature administrative in contradistinction to judicial. But ordinarily the determining factor is not the character of the function, but the character of the controverted question and the nature of the inquiry necessary for its solution. To determine what rate, rule or practice shall be deemed reasonable for the future is

legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. Preliminary resort to the Commission is required alike in the two classes of cases. It is required because the inquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable, and such acquaintance is commonly to be found only in a body of experts."

This case is much like BALTIMORE & OHIO R. R. Co. v. U. S., 215 U. S. 480, in which MR. CHIEF JUSTICE WHITE, then Associate Justice, said:

"To a consideration of this question it is essential to at once summarily and accurately fix the subject matter of the alleged grievances and the precise character of the relief required in order to remedy the evils complained of upon the assumption of their existence. As to the first, it is patent that the grievances involve acts of the Baltimore & Ohio Railroad, regulations adopted by that company, and alleged dealings by the other corporations, all of which, it is asserted, concern interstate commerce, and all of which, it is alleged, are in direct violation of the duty imposed upon the railroad company by the provisions of the act to regulate commerce. As to the second, in view of the nature and character of the acts assailed, of the prayer for relief which we have previously excerpted, and of the relief which the court below directed to be awarded, it is equally clear that a prohibition, by way of mandamus, against the act is sought, and an order by way of mandamus, was invoked and was allowed, which must operate, by judicial decree, upon all the numerous parties and various interests as a rule or regulation as to the matters complained of for the conduct of in-

terstate commerce in the future. When the situation is thus defined we see no escape from the conclusion that the grievances complained of were primarily within the administrative competency of the Interstate Commerce Commission, and not subject to be judicially enforced; at least, until that body, clothed by the statute with authority on the subject, had been afforded, by a complaint made to it, the opportunity to exert its administrative functions."

In further statement of the reasons for the decision, the Court said:

"And the destructive effect upon the system of regulation devised by the act to regulate commerce, which these illustrations show must be the result of construing that act as giving authority to the courts, without the preliminary action of the Commission, to consider and pass upon the administrative questions which the statute has primarily confided to that body, may be greatly multiplied. This is shown by the opinion of the Commission in the Baltimore & Ohio case, to which we have already referred, where the decisions of other lower courts are referred to in conflict with the opinion of the court below in this case as to mine rating, and not in harmony with the views expressed by the Commission in the Baltimore & Ohio case."

The case was reversed and remanded, with instructions to dismiss the petition.

In MORRISDALE COAL CO. v. PENNSYLVANIA RAILROAD CO., 230 U. S. 334, the plaintiff in error brought suit against the railroad for damages occasioned by an unfair distribution of cars to it and an undue allotment of cars to its competitor. The Supreme Court, speaking through MR. JUSTICE LAMAR, after stating the case, said:

"The prohibitions of § 3 of the Commerce Act require that cars shall be fairly allotted to shippers without unjust discrimination or unfair preference. But the statute does not define what is the proper method of distribution

in case of car shortage, and at the time of the transactions out of which this suit arose, no general rule had been adopted by the carriers or promulgated by the Commission. * * *

"In view of the decision in the Abilene, Pitcairn and Robinson cases it is unnecessary again to discuss the statute, or do more than say that in this case the plaintiff was not entitled to maintain its action without producing an order of the Commission that the rule adopted by the Pennsylvania Railroad was unreasonable.

"The plaintiff, however, seeks to take the case out of the principle of those decisions, insisting that this is a suit for damages occasioned by a violation of the rule; and that, therefore, without any order of the Commission, it is entitled to institute a suit for the recovery of damages resulting from the failure to distribute cars according to the method established by the railroad itself. The record, however, does not sustain this position, for the evidence does not show any breach of the rule or any failure to deliver to the Morrisdale Company all of the cars to which it was entitled under the method of allotment in force between 1900 and 1906. On the contrary, it was admitted at the hearing that there had been no discrimination against the plaintiff in the application of the rule, the complaint being that the basis of allotment was unreasonable, and that all cars in the district should be distributed according to the capacity of the mine, without deducting private cars, foreign fuel cars, or the carrier's own fuel cars. Whether this should be done as a general rule, or under the peculiar conditions prevailing on defendant's road at that time, was, as we have seen, an administrative question, and to be decided by the Commission as preliminary to the right to maintain this suit. The circuit court rightly held that until this was done it had no jurisdiction as a Federal court of the cause of action sought to be enforced."

In PENNSYLVANIA RAILROAD COMPANY v. CLARK BROS. COAL MINING COMPANY, 238 U. S. 456 (opinion by CHIEF JUSTICE HUGHES), it was said:

"This suit was brought in January, 1912, by the Clark Brothers Coal Mining Company (defendant in error) in the court of common pleas of Clearfield County, Pennsylvania, to recover damages for inadequate and unjustly discriminatory car service and supply. The complaint related to the action of the defendant company with respect to cars required for the transportation of coal from plaintiff's mines known as Falcon, Nos. 2, 3 and 4, in Clearfield County, and Falcon Nos. 5 and 6, in Indiana County, Pennsylvania, between October, 1905, and April 30, 1907. A statute of Pennsylvania (Act of June 4, 1883, P. L. 72, 4 Purdons 3906; see.Const. (Pa.) 1873, Art. 17) prohibits undue or unreasonable discrimination by any common carrier 'in charges for or in facilities for the transportation of freight within this State or coming from or going to any other State,' and provides that the carrier guilty of unjust discrimination shall be liable 'for damages treble the amount of injury suffered.'

"On behalf of the defendant (plaintiff in error) the jurisdiction of the court to entertain the action was challenged upon the ground that, with respect to car distribution, the defendant was subject to the act to regulate commerce, and that the claim of the plaintiff was cognizable only by the Interstate Commerce Commission or by the courts of the United States. * * *

"The question whether the rule or method of car distribution practiced by the railroad company as unjustly discriminatory was one which the Commission had authority to pass upon. * * * Further, by reason of the nature of the question involved in an attack upon the rule or method of the company in distributing cars, no action was maintainable in any court to recover damages alleged to have been inflicted thereby until the Commission had made its finding as to the reasonableness of the rule."

In MITCHELL COAL & COKE COMPANY v. PENNSYLVANIA RAILROAD COMPANY, 230 U. S. 247, the following question was certified to the Supreme Court:

" 'Has the circuit court of the United States, in ad-

vance of any application to the Interstate Commerce Commission and action thereon by that body, jurisdiction to entertain an action of trespass brought by a shipper of coal and coke, to recover damages because of the alleged unlawful preferential rates accorded to other and competing shippers of coal and coke, when such alleged preferential rates are claimed to have resulted from payments made to such other shippers, which payments the plaintiff claimed were rebates from the published and filed freight rates, and the defendant claimed were made as compensation for services rendered by such shippers or for other accounts which justified it in making the same, and when it further appeared that such payments had been made pursuant to a practice of long standing, and that a number of shippers other than the plaintiff were interested in the question of the lawfulness thereof,' "

The court said (opinion by MR. JUSTICE LAMAR):

"The necessity under the statute of having such questions settled by a single tribunal in order to secure singleness of practice and uniformity of rate has been pointed out and settled in Abilene, Pitcairn and Robinson cases, and is referred to here because this record and that in Pennsylvania R. Co. v. International Coal Min. Co., just decided (230 U. S. 184, 57 L. Ed., 33 Sup. Ct. 893) furnish a striking illustration of the results which would follow if the reasonableness of an allowance could be decided by different tribunals. Both cases involve the payment of 18 cents a ton to the Altoona Company during the same period and for identically the same reasons. In both the plaintiff insisted that the payment was a rebate, and the carrier that it was compensation for services rendered. In the International case the judge treated the Altoona allowance as lawful and reasonable. In this case the referee found that it was a rebate, while the trial judge, in passing on exceptions to the report, held that it was a question of fact about which the evidence was

conflicting, and thereupon approved the referee's report. Treating it as a question of fact, there may have been sufficient testimony to sustain the finding in both instances, although the conclusion was diametrically opposite. And, applying the rule that appellate courts will not disturb findings of fact where the evidence is conflicting, contradictory judgments might have been affirmed, and one plaintiff could have been awarded damages on the theory that the Altoona allowance was unlawful, and the other been mulcted in cost because the Altoona allowance was legal. This and like considerations compelled the holding that, as the courts have no primary jurisdiction to fix rates, neither can they do so at the suit of a single plaintiff who claims to have been damaged because an allowance paid its competitors was unreasonable in amount.

"It is argued that this conclusion ignores §§ 9 and 22, which give the shipper the option of suing in the courts or applying to the Commission. The same argument was made and answered in the Abilene case by showing that to permit suits based on the charge that a particular practice was unreasonable, without previous action by the Commission, would repeal the many provisions of the statute requiring uniformity and equality. For, manifestly, such uniformity and equality cannot be secured by separate suits before separate tribunals, involving the reasonableness of a rate or practice. The evidence might vary, and, of course, the verdicts would vary; with the result that one shipper would succeed before one jury and another fail before a different jury, where the reasonableness of the same practice was involved. Manifestly, different verdicts would occasion inequality between the two shippers, and it is equally manifest that if the Commission had made one order of which both could avail themselves, there would have been one finding, of which one, two, or a score of shippers could equally avail themselves. The claim that this conclusion nullifies § 9 is concretely answered by the fact that the court has just decided to the contrary in Pennsylvania R. Co. v. International Coal Min. Co. There the carrier insisted that a suit for damages occasioned by rebating could not be

maintained without preliminary action by the Commission. This contention was overruled, and it was held, that, for doing an act prohibited by the statute, the injured party might sue the carrier without previous action by the Commission, because the courts could apply the law prohibiting a departure from the tariff to the facts of the case. But where the suit is based upon unreasonable charges or unreasonable practices, there is no law fixing what is unreasonable and therefore prohibited. In such cases the whole scope of the statute shows that it was intended that the Commission, and not the courts, should pass upon that administrative question. When such order is made, it is as though the law for that particular practice had been fixed, and the courts could then apply that order, not to one case, but to every case—thereby giving every shipper equal rights and preserving uniformity of practice."

In LOOMIS v. LEHIGH VALLEY R. R. Co., 240 U. S. 43, 36 Sup. Ct. 228 (opinion by MR. JUSTICE MCREYNOLDS), the court said:

"Plaintiffs in error have long been shippers of grain and produce over the line of defendant carrier from Victor and other stations in Western New York. From time to time during a period beginning in August, 1906, and ending May 6, 1908, they requested it to furnish at such places for their use one or more cars—about two hundred altogether—suitable for transporting in bulk, wheat, oats, rye, apples, cabbages, and potatoes. In response, it sent ordinary box and refrigerator cars inadequate for the required service until fitted with inside doors or transverse bulkheads. Prior to 1906, in like circumstances, the custom was for the railroad to supply lumber without charge and shippers constructed these temporary fittings. This practice was discontinued at the stations mentioned, and, during the period specified, it refused either to supply such material or cars completely prepared for carrying in bulk the enumerated articles. Plaintiffs were therefore compelled to construct inside doors or bulkheads in

the cars which they loaded and delivered to defendant for transportation to points both within and beyond the state. The total cost of material used was $322.07—it varied from 40 cents to $3.50 per car.

"Payment of the amount so expended was demanded by plaintiffs and refused. Without preliminary resort to the Interstate Commerce Commission, they then brought this action in a State court upon the theory that the carrier having failed to perform its common-law duty to furnish adequate cars, they were entitled to recover as damages their consequent outlay. * * *

"Speaking through Mr. Justice Lamar in Mitchell Coal & Coke Co. v. Pennsylvania R. Co., 230 U. S. *supra,* we said (p. 255):

" 'The courts have not been given jurisdiction to fix rates or practices in direct proceedings, nor can they do so collaterally during the progress of a lawsuit when the action is based on the claim that unreasonable allowances have been paid. If the decision of such questions was committed to different courts with different juries the results would not only vary in degree, but might often be opposite in character—to the destruction of the uniformity in rate and practice which was the cardinal object of the statute.'

"In the Minnesota Rate Cases, 230 U. S. *supra,* we further said (p. 419): 'The dominating purpose of the statute was to secure conformity to the prescribed standards through the examination and appreciation of the complex facts of transportation by the body created for that purpose; and, as this court has repeatedly held, it could be destructive of the system of regulation defined by the statute if the court, without the preliminary action of the Commission, were to undertake to pass upon the administrative questions which the statute has primarily confided to it.'

"And in Texas & P. R. Co. v. American Tie & Timber Co., 234 U. S. *supra,* the rule was thus stated (p. 146): 'It is equally clear that the controversy as to whether the lumber tariff included cross-ties was one primarily to be determined by the Commission in the exercise of its

power concerning tariffs and the authority to regulate conferred upon it by the statute. Indeed, we think it is indisputable that that subject is directly controlled by the authorities which establish that, for the preservation of the uniformity which it was the purpose of the act to regulate commerce to secure, the courts may not as an original question exert authority over subjects which primarily come within the jurisdiction of the Commission.'

"An adequate consideration of the present controversy would require acquaintance with many intricate facts of transportation and a consequent appreciation of the practical effect of any attempt to define services covered by a carrier's published tariffs, or character of equipment which it must provide, or allowances which it may make to shippers for instrumentalities supplied and services rendered. In the last analysis the instant cause presents a problem which directly concerns rate-making and is peculiarly administrative. Atchison, T. & S. F. R. Co. v. United States, 232 U. S. 199, 220, 58 L. Ed. 199, 576, 34 Sup. Ct. Rep. 291. And the preservation of uniformity and prevention of discrimination render essential some appropriate ruling by the Interstate Commerce Commission before it may be submitted to a court. See Pennsylvania R. Co. v. Puritan Coal Min. Co., 237 U. S. pp. 128, 129, 59 L. Ed. 871, 872, 35 Sup. Ct. Rep. 484; Pennsylvania R. Co. v. Clark Bros. Coal Min. Co., 238 U. S. pp. 469, 470, 59 L. Ed. 1412, 35 Sup. Ct. Rep. 896.

"If, in respect to interstate business, the courts of New York may determine, as original matters, rate-making problems, those in other States have like jurisdiction. The uncertainty and confusion which would necessarily result is manifest. Ample authority has been given the Commission, in circumstances like those here shown, to administer proper relief, and in connection therewith to approve some general rule of action. In so doing it would effectuate the great purpose for which the statute was enacted."

PANY, *supra*, is so familiar to the Court that a restatement of the facts is unnecessary. The following quotation, however, from the opinion, is directly applicable to the question now presented:

> "When the general scope of the act is enlightened by the considerations just stated it becomes manifest that there is not only a relation, but an indissoluble unity, between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discrimination. This follows, because, unless the requirement of a uniform standard of rates be complied with, it would result that violations of the statute as to preferences and discrimination would inevitably follow. This is clearly so, for *if it be that the standard of rates fixed in the mode provided by the statute could be treated on the complaint of a shipper by a court and jury as unreasonable, without reference to prior action by the Commission*, finding the established rate to be unreasonable, and ordering the carrier to desist in the future from violating the act, it would come to pass that a shipper might obtain relief from the basis that the established rate was unreasonable, in the opinion of a court and jury, and *thus such shipper would receive a preference or discrimination not enjoyed by those against whom the schedule of rates was continued to be enforced*. This can only be met by the suggestion that the judgment of a court, when based upon a complaint made by a shipper without previous action by the Commission, would give rise to a change of the schedule rate and thus cause the new rate resulting from the action of the court to be applicable in future as to all. This suggestion, however, is manifestly without merit, and only serves to illustrate the absolute destruction of the act and the remedial provisions which it created which would arise from a recognition of the right asserted. For *if, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that, unless*

all courts reached an identical conclusion, a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. *Indeed, the recognition of such a right is wholly inconsistent with the administrative power conferred upon the Commission, and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power in the courts, independent of prior action by the Commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy would be successfully inflicted. Indeed, no reason can be perceived for the enactment, of the provision endowing the administrative* tribunal which the act created with power, on due proof, not only to award reparation to a particular shipper, but to command the carrier to desist from violation of the act in the future, thus compelling the alteration of the old or the filing of a new schedule, conformably to the action of the Commission, *if the power was left in court to grant relief on complaint of any shipper, upon the theory that the established rate could be disregarded and be treated as unreasonable, without reference to previous action by the Commission* in the premises. This must be, because, *if the power existed in both courts and the Commission* to originally hear complaints on this subject, there might be a divergence between the action of the Commission and the decision of a court. In other words, the established schedule might be found reasonable by the Commission in the first instance and unreasonable by a court acting originally, and thus a conflict would arise which would render the enforcement of the act impossible." (Italics ours.)

The majority in the Circuit Court of Appeals said "there is no car shortage and no emergency which renders the carriers unable to comply with" a writ of mandamus (R. 195). The record furnishes no adequate foundation for that statement. The hearing at which the only record evidence was taken was confined to petitioners' pleas to the jurisdiction of the court (R. 71). There has been no pleading or hearing on the merits. If that should ever become necessary, it will then be disclosed whether a car shortage exists. Whether it exists at a particular moment may be irrelevant. From past experience the Court may well assume that if the writ of mandamus should issue, a car shortage probably would occur while the writ remained in force; and in such a situation the outstanding writ would preclude prompt administrative action by the Commission or executive action by the carriers. Thus, the very error into which the majority have fallen discloses the essential need for administrative action and the impropriety of a writ of mandamus.

A writ of mandamus commanding the Port Isabel to furnish cars would be vain, because it owns none. The writ must first require it to procure some; but an order to require a carrier to supply itself with cars, involving as it does corporate finances, the price of equipment, the types of cars needed, and other technical matters, is essentially one for the Commission, under Section 1 of the Interstate Commerce Act (U. S. C. A., Title 49, Section 1).

In the majority opinion of the Circuit Court of Appeals, it is said:

> "It is true that the carriers in this case have published no joint through rate, but it is admitted that they are connecting carriers; that the commerce which appellants seek to have transported over appellees' joint lines is a through movement between the Port of Brownsville and the interchange with the National Railways of Mexico; and that both of the appellees have promulgated

> and filed with the Commission tariffs naming per car charges for such through transportation."

The carriers are required to publish reasonable rates from and to the border, and the jurisdiction of the Interstate Commerce Commission or of the courts applies to international commerce only insofar as the transportation takes place within the United States. LEWIS-SIMAS-JONES CO. v. SOUTHERN PACIFIC CO., 283 U. S. 654. As a corollary thereto, the movement covered by the tariffs in question is not a part of a through movement between the Port of Brownsville and a point on the lines of the National Railways of Mexico; but on the contrary is and can be solely a switching movement within the territorial limits of the United States. If the quoted statement were true, petitioners could be compelled to establish through routes and rates between a point in the United States and a point in the Republic of Mexico. That such is not the law is shown in LEWIS-SIMAS-JONES CO. v. SOUTHERN PACIFIC CO., *supra.*

Even where carriers join in establishing through routes and joint rates, intermediate carriers have never been required to furnish more than a ratable or proportionate number of cars. HUERFANO COAL CO. v. COLORADO & SOUTHEASTERN R. R. CO., ET AL., 28 I. C. C. 502; LUMBER RATES THROUGH OHIO RIVER CROSSINGS, 29 I. C. C. 38; CAMPBELL'S CREEK COAL CO. v. ANN ARBOR R. CO., ET AL., 33 I. C. C. 558. But see, IN RE HANDLING OF FRESH MEAT, 132 I. C. C. 49, in which the Interstate Commerce Commission said:

> "A shipper served by a switching line ordinarily makes request of that line for cars, but the carrier receiving the road haul is commonly looked to eventually to furnish cars, and respondent's freight traffic manager so testified."

What would be a ratable or reasonable number of cars under all the surrounding transportation circumstances would clearly be a question for the Commission rather than the

courts. So, even in the case of through routes and joint rates, the question would be administrative rather than judicial. Much more so is this true, when, as here, there is no through route, but only a combination of *separately established switching charges.*

In EX PARTE BALDWIN, ET AL., 291 U. S. 610, mandamus was refused because a remedy existed by injunction. Here an administrative remedy appears on the face of the complaint.

The issuance of the writ of certiorari in this case seems to us to be highly appropriate. Under applicable decisions of this Court, heretofore cited, the learned trial judge and CIRCUIT JUDGE HUTCHESON seem to us to have reached a correct conclusion, and CIRCUIT JUDGES FOSTER and HOLMES appear to be clearly wrong. If the writ be refused, the District Court must feel bound by the decision in the Circuit Court of Appeals, and must enter upon a long and tedious hearing to solve problems essentially legislative, technical and administrative in their nature; and would probably feel bound, by reason of the language of the majority opinion, to issue a writ of mandamus unless the proof showed the existence of a shortage of cars. In the end, the case would come again to this Court for its determination of the very question now presented.

There is something inherently wrong in a demand that an American railroad, operating an intermediate switching line and enjoying no substantial revenue from the transaction, should be required to furnish all of the equipment for the movement of international traffic, when the Mexican railroads, the real beneficiaries of the movement, are unwilling to furnish any part of the rolling stock, and when the court which is called upon to enter the order must direct that American railroad, in order to comply with the demand, to send its property out of the jurisdiction of this and every other court of the United States, where it will be subjected to the vicissitudes of a foreign jurisprudence.

We respectfully ask that a writ of certiorari issue to review the decision of the Circuit Court of Appeals.

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